UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKt
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IN RE: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

03 MDL 1570 (GBD)(FM)
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New York, N.Y.
June 28, 2013
11:00 a.m.

Before:

HON. FRANK MAAS,

Magistrate Judge

APPEARANCES

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PETER SALERNO, of counsel

(In open court)

DEPUTY CLERK: This is a conference in the matter of In Re: Terrorist Attacks on September 11.

Counsel, please state your names for the record.

MR. KREINDLER: James Kreindler. Good morning, your Honor.

THE COURT: Good morning.

MR. CARTER: Good morning, your Honor, Sean Carter from Cozen O'Connor for the Federal Insurance plaintiffs.

MR. HAEFELE: Good morning, your Honor, Robert Haefele, Motley Rice, for Burnett plaintiffs.

MR. KABAT: Good morning, your Honor, Alan Kabat for Al Haramain.

MS. BERGOFFEN: Good morning, your Honor, Roni Bergoffen on behalf of the Dubai Islamic bank.

MR. LEWIS: Good morning, your Honor, Eric Lewis on behalf of the Muslim World League and International Islamic Relief Organization. This is my first appearance, and I would also like to introduce my partners Ms. Henry and Mr. Leimkuhler.

THE COURT: Good morning, and welcome.

MR. MOHAMMEDI: Good morning, your Honor, Omar Mohammedi on behalf of WAMY & WAMY International.

MS. ROTHSTEIN: Good morning, your Honor, Amy Rothstein of Doar, Rieck, Kaley & Mack for Yassin Abdullah

Kadi.

THE COURT: Also new to the party.

MS. ROTHSTEIN: Correct, your Honor.

MR. SALERNO: Peter Salerno, of counsel, from Doar, Rieck, Kaley & Mack for Kadi.

MR. FLEMING: Good morning, your Honor, Timothy Fleming, Wiggins, Childs, Quinn & Pantazis, appearing for the plaintiffs in the Havlish case as well as plaintiffs in the Hoglan case.

MR. TARBUTTON: Good morning, your Honor, Scott Tarbutton, Cozen O'Connor, for the insurance plaintiffs.

MR. GOLDMAN: Good morning, your Honor, Jerry Goldman, Anderson Kill for the O'Neil plaintiffs and the Plaintiffs' Executive Committee.

MR. MELLON: Good morning, your Honor, Tom Mellon on behalf of the Havlish and Hoglan plaintiffs.

MR. McCOY: Good morning, your Honor, James P. McCoy on behalf of the Havlish and Hoglan plaintiffs.

THE COURT: Good morning, everyone. I see that the mandate issued as to the remanded defendants yesterday. And one thing I wanted to take up with counsel is when I have been getting letters, sometimes the type font has been shrinking, and hence forth I would like all letters to be in at least 12 point font. It makes it very difficult to read, particularly when you have lengthy letter applications.

Dealing first with the issue of document discovery, I guess more accurately, I confess I am a little confused because I thought we -- and I understand there are additional defendants now, but as to those defendants who have been along for the ride thus far, I thought we had a document discovery deadline. I confess I'm not quite sure what it was at this point, but I also had the impression that it expired and that we were dealing with motions to compel or for sanctions. But both sides are talking about a schedule which is six months out, so if somebody could enlighten me on how we got to another rolling deadline, I would appreciate that.

MR. CARTER: Your Honor, I think I can. And I think Mr. Lewis can probably chime in as well. We were approached by the new attorneys for the Muslim World League some months ago. They raised a proposal that we afford them an opportunity to attempt to cure some deficiencies in the document productions that had a been made to date, asked us if we would give them that opportunity in exchange for agreeing not to move for entry of defaults at this time without waiving our right to move for sanctions relative to anything we believe to have been a form of misconduct to date. And we said we were amenable to that approach, provided that they could get the other defendants on board and that we basically took a snapshot that was a limited window to try and fix everything and get the complete universe of documents to which we're entitled.

THE COURT: That would put us to the end of the year, and it seems to me also it affects Judge Daniels' schedule because he contemplated motions for summary judgment I guess in the fall or thereabouts.

MR. CARTER: If he had that in mind, your Honor, it had not been shared with us. We did not have a --

THE COURT: According to the last time he held a conference, he didn't set dates clearly, but I thought he set out the grand scheme of how he thought the case might go forward. Am I inventing that?

MR. CARTER: I do not remember that at all, your Honor.

THE COURT: OK. Well, I suppose with new counsel here and hope springing eternal that's an appropriate extension of time, so I will grant the six-month extension.

As to the remanded defendants, the objection that the mandate has not issued obviously has gone by the boards.

There was reference in the defendants' letter to a proposed July 31 deadline, and I tried to find the antecedent to that and couldn't, so I'm not sure what the July 31 deadline mentioned in the letter was.

MR. CARTER: Your Honor, I think it was in response to a proposal we had made that although there was a six-month rolling production deadline, defendants who have been before the Court for several years now in discovery should make an

effort to essentially wrap up their productions early on so that we could use the remaining period of the six-month window to do motions, analyze their documents, and try and bring as much as possible to conclusion within the six months. They had objected to the proposal that their productions be due by July 30 and said that they had voluminous materials and it will take them essentially the full window is the suggestion.

I guess our view on that, your Honor, is that we think there has to be some interim pressure points to keep people on track here. And whether or not it's a firm deadline for completing productions or as an alternative, perhaps, just regular status reports to the Court about what's been done, what's been produced, and what remains to be done say on a monthly basis, either way we're fine. We want to avoid a situation in which everyone takes the six months and says let's sit on it until five months from now and dump everything at the last day.

THE COURT: Or say six months is inadequate and we need another six months.

MR. CARTER: Correct. So we're really trying to create a structure that keeps us on base.

MR. LEWIS: Your Honor, if I may be heard.

THE COURT: Please.

MR. LEWIS: We had a very positive meeting after the 16th of April conference with your Honor when I said we are

committed and the client is committed to getting all of these problems behind us. We need time. We also need to sit down -- we're not going to just ask you what you want, we have ideas about where we think there are gaps. But before we get on an airplane to Islamabad or Jakarta, let's make sure we're on the same page, particularly as there's going to be supplemental requests. Those are difficult logistical and security environments, and we want to go once.

We have been asking for that meeting since April. I respect the fact that plaintiffs have had a lot on their plate in the Court of Appeals, but we have said we have Arabic speakers, we have a team ready to go, we are putting together agendas. We want to have the meeting before everyone starts running around. So I was somewhat surprised to see the July 30 smack in the middle of Ramadan, people aren't working more than a few hours a day. We are committed to moving forward quickly, but we can't do it in a month, we can do it in six. And I was pleased to hear Mr. Carter say six months and your Honor grant that. And we'll give whatever interim reports your Honor wishes, but we have no intention of waiting five months and saying sorry, we need more time. Our intention is to move forward once we have a meeting of the minds to the best we can with the plaintiffs. Thank you.

THE COURT: When are you going to sit down with Mr. Lewis and his colleagues?

MR. CARTER: Your Honor, we indicated to Mr. Lewis and his colleagues we would give him dates early next week when we're available. And we also indicated we're more than happy to provide essentially a list of where we think there are some notable gaps that are illustrative to the problems.

But back to something your Honor said at a conference previously, we think there has to be a comprehensive approach on the part of the defendants. We can't tell them what documents they have that are responsive. So the best we can do is provide some examples, but the process has to be ongoing, and really should have, in our view, been ongoing for some time in recognition of the conversations we already had. But we'll set something up with the next couple of weeks.

THE COURT: Why don't I say that by September 20th you and Mr. Lewis will submit to me a written progress report, and if need be I'll schedule a conference separately to deal with any issues that relate to those defendants.

MR. LEWIS: Yes, your Honor.

MR. CARTER: Yes, your Honor.

THE COURT: There's the proposal from the plaintiffs that defendants, to the extent they can, serve consolidated discovery requests so that you don't have respond to the whole series of different and potentially overlapping requests. I know this came up in the last round or maybe two rounds ago, and I didn't go back through the docket, but my recollection is

that I directed that that occur and that it was pretty much a disaster. Do I have that wrong?

MR. CARTER: Your Honor, I don't think from our perspective it was a disaster. There was some disputes over the scope of the consolidated requests, but it did alleviate the need to respond to those requests for six different defendants with slight variations, and at least we had one dispute over the consolidated request rather than five. Part of our concern here really relates to the fact that many of the remanded defendants are officials or former officials of defendants who have been engaged in discovery for a very long time.

THE COURT: Say that again?

MR. CARTER: They're officials or former officials of entities that have been engaged in the discovery process for some time. So if you take the example, for instance, of Defendant Basha, he is the director of the IRO. He, I know Mr. McMahon has said on a number of occasions, has himself been involved in the discovery process to date. It really does not make much sense for Dr. Basha to serve discovery requests that are identical to those that the IRO already served and covering the same territory. And in many cases some of these attorneys have been involved already in the discovery process. So that's the focus of it from our perspective.

MR. KABAT: Your Honor, could I please speak to that.

The issue with discovery with respect to the remanded defendants is slightly distinct from the merit discovery because the Second Circuit on May 27 in a slip opinion outlined the areas for jurisdictional discovery. So naturally we want and our clients want information relating to those topics that the Second Circuit outlined should not necessarily have been covered -- So for that reason, Dr. Basha and the other people mentioned would need to be able to serve their own discovery related to the jurisdictional issues, and that both sides would try to avoid any overlap. Because of the different focus, I don't think there could be that much overlap.

THE COURT: You can correct me if I'm wrong, but I don't think Mr. Carter would quarrel with that, or his colleagues. I think they're trying to avoid two things, one, as you alluded to, needless duplication with prior requests, but also getting a dozen different sets of requests when they could be consolidation among the remanded defendants. And I think both of those are goals that should be pursued.

So I think what I will do is simply say that to the extent possible the requests should not duplicate prior requests, nor -- well, should not duplicate prior requests, and additionally those defendants who were making jurisdictional discovery requests -- and I recognize that there may be unique aspects of each remanded defendant, but to the extent that there's some commonality, there should be a set of common

requests.

I think that's essentially the ruling I made last time. I'm not sure it could be done any more precisely than that, Mr. Carter.

MR. CARTER: No, I think that's fine, your Honor.

THE COURT: Perhaps I should have asked this earlier, but how many defendants are in the case today, either as a remanded defendant for jurisdictional discovery or as to merits discovery?

MR. CARTER: Your Honor, I'm going to put a sort of a ballpark estimate at about 20.

THE COURT: OK. And how many of those are in jurisdictional discovery?

MR. CARTER: It would be the dozen remanded by the Second Circuit.

THE COURT: So no one else.

MR. CARTER: Well, there was jurisdictional discovery ongoing as to Rabita Trust. There is obviously the motion pending as to Rabita.

MR. KABAT: Your Honor, I would just note that two of the remanded defendants are deceased and there's been no effort to made to substitute the estate for them. And two other remanded defendants were not represented on appeal, they're not currently represented either. So it's possible that we're only dealing with eight remanded defendants who will actually

participate in the case.

THE COURT: OK. I just wanted, as Mr. Carter put it, a guesstimate, to see whether or not whether anything had changed materially.

There's the issue of follow-up discovery and it seems to me that follow-up discovery should be limited to reasonable requests suggested by that discovery which is produced. Frankly, I don't want to get mired in a request by request review, but beyond stating it that way, I'm not sure what else I can do to set guidelines for either side at this point.

MR. CARTER: Your Honor, I think that there are two sort of practical dimensions to this that we're concerned about. And the first, as identified in the letter, is this concern about these individualized disputes over whether a request is a legitimate follow up or new. And that's of particular concern to us because of some of the FOIA inquiries that remain outstanding. And what we perceive --

THE COURT: When you say the FOIA inquiries, you're speaking about FOIA requests that are currently being processed by the government?

MR. CARTER: Correct.

THE COURT: I thought I convinced you not to make any more FOIA requests.

MR. CARTER: Your Honor, we don't mind turning the stuff over consistent with your ruling. Some of the FOIA

requests were made in 2003 and we're still waiting for them, so we can't undo that.

But to sort of put a focal point on it, from about May of 2012 through October of 2012 Dubai Islamic Bank and counsel Clifford Chance were engaged in an ongoing dialogue with the Treasury Department objecting to the Treasury's plan to release certain documents to us. So their intervention in the process and objection to the Treasury actually served to delay production of materials pursuant to FOIA until after the original discovery deadline your Honor set. And we suspect that there's more of that going on in the background. We don't really want to fight about whether we're entitled to follow up on information that's released to us by the government in response to FOIA, just as an example.

And as a practical matter, your Honor, I don't think this really relates as much to concerns about a new set of discovery requests but rather many of the defendants objected to discovery requests that we served in July of 2012 as untimely at that time even though discovery hadn't ended. And it seems that the real effort here is to avoid answering discovery that was served a year ago, and had it been answered in due course, we would be well past this. So we're going to move to compel on those issues, we just didn't want the ruling right now to go back in time and sort of bar discovery that had been served long ago.

THE COURT: If it was served previously and not adequately responded to, I view that as a wholly separate issue from somebody who received your discovery requests, responded producing everything that they reasonably could find, and then were served with a new battery of requests and said that these should have been a part of what we looked at when we served originally, which is a concern that Mr. Lewis was raising a while ago.

MR. CARTER: Your Honor, I think it has to do with the stuff that was served a while ago in the prior period. And to the extent there are follow-up discovery requests, or in certain cases the way that objections have been framed may require us to rephrase some requests for the same subject matter. But that's all we're really asking for the opportunity to do.

THE COURT: And I think I'll have to deal with it on a case-by-case basis.

In terms of the applications that I have received thus far either to compel or for sanctions, I haven't ruled on any of them because I was hoping to deal with them as they grew, much the same way I know Judge Daniels helps the group deal with substantive motions as a group.

With respect to Rabita Trust, there was a suggestion in the letter that I was going to -- maybe I was misreading it, but it sounded like there was a belief that I was going to

undertake some sort of review of the in camera documents that were submitted to me to determine whether they properly were attorney-client material that couldn't be compelled. Whereas my view was they had been submitted -- I guess not just Rabita Trust, but Jelaidan also, but they had been submitted simply to show that those defendants had been proceeding in good faith for whatever light it shed on the motion rather than something where I was going to direct that potentially some documents be turned over.

Is that consistent with plaintiffs' understanding?

MR. CARTER: Your Honor, the scope of the review that you outlined is consistent with our understanding. I think the one issue is that your Honor had identified in the context of the review a letter to Habib Bank, I believe, and raised with Mr. McMahon that you couldn't identify any reason why that would have been deemed privileged and not turned over, and asked Mr. McMahon to send it to us, and we still don't have it. So that's the one example where the Court sua sponte sort of raised a question about the scope of the asserted privilege.

THE COURT: I remember that. I will go back and look at the document. Mr. McMahon, as you all know, sent a letter saying that he wanted to participate in this conference by telephone but didn't phone in. We tried to reach out to him and weren't able to reach him.

There's also the issue of depositions.

MS. BERGOFFEN: Your Honor, if I may, before we move on to depositions, if I can could respond to a couple of Mr. Carter's points with regard to follow-up discovery, document discovery.

THE COURT: Yes.

MS. BERGOFFEN: Your Honor, just to be clear, what we want to avoid is plaintiffs being able to reuse the remand of the twelve additional jurisdictional discovery defendants to simply open up the flood gates to a slew of document requests unrelated to the hundreds and hundreds of requests that were served back in 2010.

Your Honor, the deadline to serve document requests passed more than two and a half years ago. While your Honor extended the production deadline several times, including through last August, almost a year ago, there is simply no basis, nor have you extended the document request deadline beyond 2010.

Now recognizing that it took a long time and very extensive efforts on behalf of defendants to collect and produce documents, we understand the nature of the need to have extended the rolling production deadline, but that had nothing to do with simply carte blanche allowing plaintiffs to serve document requests whenever they wanted with regard to, quite frankly, topics that were otherwise objectionable for a variety of reasons, including being beyond the scope of Rule 26. That

also, by the way, is this FOIA request that Mr. Carter alluded to fall under the scope of things that wouldn't be covered under the scope of Rule 26 that would be producible. That issue is not ripe for your Honor at this point anyway.

Nor, your Honor, is the reference that Mr. Carter made to the supplemental requests that were validly objected to not only on the basis of timeliness but for other reasons, including being beyond the scope of Rule 26, which by the way, your Honor, those were served almost a year ago, validly objected to almost a year ago, and we never heard, before the context of preparing for this hearing, any word from plaintiff making any mention -- we simply never heard from them after sending a letter upon receipt of their supplemental requests and following up with formal objections, we never heard a single word if them back on those, which, with all due respect, indicates to me Dubai Bank and the other defendants completed their production in August of 2012. It's simply more of a fishing expedition. They're not pleased at this point with what they found within the production, they're simply wanting to reopen the possibility to go for more and more and getting increasingly further away from the actual substance or relevant issues in this case.

So we ask that any order that you issue today clarify that following discovery for those merits defendants who have been actively engaged in discovery be limited to things that

are tied to valid motions to compel, follow up in connection with motions to compel, and not simply opening it up for new avenues of inquiry ten years into this case.

THE COURT: Mr. Carter.

MR. CARTER: Your Honor, it's a bit of an abstraction. There's an idea of Pandora's box that is completely invented for the purposes of making the argument. The fact of the matter is that we don't have documents from many of the defendants. They acknowledged that we don't have their documents. And it's really impossible to do a follow-up discovery until we get the documents from really everyone because there's interrelationships here.

So this has to be a two-way street. There has to be complete productions that we can go through making an assessment of what is missing, maybe what has been withheld from one party and we suddenly get a signal about from another party. We're not trying to prejudge the motion to compel as to Dubai Islamic Bank. The fact of the matter is that we have been very active in targeting defendants sequentially in a way that we thought made sense and wouldn't overburden the Court all the once with 6,000 motions to compel. And we're moving through that process and we'll continue to do so. But I think the follow-up discovery order has always been there and we're just intending to comply with it.

THE COURT: I don't think this is something I can deal

with in the abstract in the way that you've suggested. I think there have to be concrete examples. And the discussion that there may be an issue that becomes a non-issue or may become an issue, that takes a lot of my time. But beyond what I said previously, I don't know that I can provide greater guidance to either side at this point in time.

MS. BERGOFFEN: Your Honor, one thing, recognizing that I think there are two separate issues, and clearly we have to deal with motions to compel regarding standing discovery requests, what I'm trying to avoid is receiving in the next couple of weeks a hundred more document requests dealing with all sorts of new avenues that we would have to put in objections and burden the Court with. I think there might be some sort of middle ground where they would be tied to valid motions to compel.

THE COURT: Unless I missed something in what Mr. Carter is saying, it doesn't sound like you're going to be getting a slew of requests in the next few weeks, because in part he was saying it's contingent upon receiving documents from the defendants so he can have a greater understanding of what else he should be asking for.

And am I misunderstanding what you were saying?

MR. CARTER: You're not. And the other possibility that we know we're likely to get information in response to FOIA soon that could be relevant, but there's not some grand

set of document requests in the works on our end at all.

THE COURT: Let's move on to the issue of depositions. I have read both sides' submissions. My view is that if a defendant wants to take a deposition before document discovery is complete, I don't see a reason why that shouldn't be allowed. But they proceed at their own peril and are unlikely to get a second bite at the apple if, at the end of the document discovery period, there are additional documents they wish they had earlier and would like to question about.

MR. CARTER: Your Honor, I think a good bit of our concern relates to, for instance, third-party witnesses, former government officials, if subpoenas suddenly go out to people --

THE COURT: I thought we were focusing on parties. Are there third parties that defendants contemplate deposing at this point?

MS. BERGOFFEN: There are, your Honor.

THE COURT: Tell me why and who.

MS. BERGOFFEN: Your Honor, plaintiffs have listed in their 26(a) disclosures dozens of individuals, including several current and former government officials from various agencies, including the State Department, the CIA and the like.

Your Honor, if I may note, the process of taking these depositions will -- we anticipate that there's a potential for those agencies to try to pose (2)(a) type of requirements, and it will be a long and drawn-out process, potentially. We need

to be in a position, once we get through plaintiffs' most recent production, to move forward in taking those depositions.

THE COURT: Given the nature of what you're inquiring about, I would be flabbergasted if there weren't objections as to the present and former government officials. I would be somewhat surprised if there were areas that you're allowed to inquire at the end of the process in any event. But since there's likely to be a convoluted process of getting to the government saying what it is that can be inquired about, I'm not sure I see a harm in allowing that process to go forward at the same time as document discovery.

MR. CARTER: Your Honor, if I may, part of the problem and part of the reason we ended up in our position is because when we had our meet and confer and the deposition issue was raised, we asked: Who do you intend to depose? What's the plan? And were told we're not going to disclose our deposition strategy at this point. So we were left in a complete vacuum without an ability to appreciate whether this is a problem or not. Personally, I haven't conferred with everyone about this because we're just hearing who is it now. I don't think it's a problem to initiate that process. However, we do know that for certain of these witnesses, the very agencies where they worked are set in the relatively near future to release information in response to FOIA. So this a perfect example of where a dialogue might be helpful with regard to a specific individuals

to try and make sure we have the documents when we go in there.

THE COURT: Well, the start of the process is a notice of deposition being served. So as the process unfolds, you'll certainly know which government officials or former officials they're seeking to depose. And if it impacts on FOIA requests, you can have that discussion as you move forward. But as just in broad brush strokes I'm not going to say that depositions cannot be taken as to party witnesses, understanding that there may be not a second bite at the apple, and in particular to these non-party present and former government officials where there's likely to be a long road to go down before anybody can actually take such deposition.

Is there something that you wanted to add?

MR. HAEFELE: I'm unclear, your Honor. When you say the depositions of the party witnesses, I wasn't clear about what your ruling was with regard to that.

THE COURT: Well, in the broadest terms I'm not going to say that at any point from now forward either side cannot notice the deposition of the other side either as to an organizational witness or as to an individual. But what I said earlier was if those depositions are taken before the document discovery period is over, I will not look kindly upon a request to continue the deposition, because if on the penultimate day of the document discovery period you got some juicy documents from the plaintiffs that you wished you had asked about, that

would be too bad, I would not allow a second deposition. That obviously runs both ways.

MR. HAEFELE: That raises two concerns on my part, your Honor, number one is just recalling that we're still -- recalling and emphasizing we're still in liability phase only, not damages. And I just wanted make sure that's clear.

THE COURT: Sure.

MR. HAEFELE: Because I imagine that will be something that defendants would be interested in deposing at least the Burnett plaintiffs and the other individual plaintiffs.

And the other issue, your Honor, is it still seems to touch on the fact that many of the documents have not been produced, and when a witness is deposed there very well may be a number of documents in the defendants' possession relative to those witnesses, and that witness's deposition has been done already.

THE COURT: Well, they're not going to be able use a document that they haven't produced to you. And I understand the concern that the witness might be sandbagged, but the witness presumably is only capable of testifying about that which he or she recalls, and so it's hard to see how that prejudices truly an individual being deposed.

As to the extent that it applies, to the extent that there are organizational witnesses being deposed pursuant to Rule 30(b)(6), I suppose that is more of a concern. But again,

I think we'll have to deal with that in concrete examples rather than an abstraction

MR. HAEFELE: What's running through my mind is that the abstract and concrete is not something that I'm able to give good examples about when I say this. The circumstance I'm contemplating is something where the defendants, for example, notice a deposition of a third-party witness, have documents in their possession that they haven't produced, do the deposition, and then we get the documents and the plaintiffs want to ask more questions based on those documents of that particular witness.

THE COURT: Well, that would not have been you jumping the gun, it would have been them jumping the gun. And were that circumstance to arise, I think I would be sympathetic to your concern. I think it really would be more where the person noticing the deposition then seeks a second bite at the apple. That's all I was talking about.

MR. HAEFELE: Thank you.

THE COURT: As to the schedule of sovereign immunity defense motions and the issue of who ought to be setting the schedule, when I first read the letters my impression was that that certainly falls within the scope of my general pretrial referral from Judge Daniels. Frankly, to see whether I was missing anything in that regard, I spoke to him this morning, and I think it's safe to say we're both on the same page as to

that.

But in terms of the procedural context, I think both of us are a little confused. Judge Daniels had set a schedule along the way for motions to dismiss. It's not clear to him or me why there are additional motions potentially coming before him now not in the context of summary judgment down the road. I understand somebody who is claiming sovereign immunity would not want to go through discovery before filing a motion, but it's not clear which defendants we're talking about or why the motions are being filed now rather than some time ago.

Mr. Kabat.

MR. KABAT: I'll speak to that. When we represented sovereign individuals and we filed our motions to dismiss, we had both 12(b)(1) sovereign immunity and personal jurisdiction claims. Now moving forward here in 2010, shortly before Judge Daniels issued his decision in the summer of 2010, the Supreme Court came out with a decision called Samantar, S-A-M-A-N-T-A-R, and the Supreme Court held that the Foreign Sovereign Immunities Act did not apply to individual defendants who instead would have to revert to the old common law immunity. And both we and the plaintiffs submitted supplemental letters to Judge Daniels about that decision, but within a month Judge Daniels issued his two decisions and he only decided the personal jurisdiction defense against those individual who also had the lack of subject matter

jurisdiction.

In our Second Circuit brief we pointed out that our clients also have subject matter jurisdiction for failure to state a claim, and the Second Circuit did not address those other defenses. And under Rule 12, I believe it's 12(h), a jurisdictional defense can always be renewed, it is not waived, it is not lost by the fact that part of the case was remanded. And so we submit that those defendants have the right under 12(h) to renew their motion to dismiss for lack of subject matter jurisdiction invoking the common law sovereign immunity. And the contours of that are somewhat similar to the procedure for sovereign immunity. And I would note that there are already two decisions out of this Court after Samantar that applied the common law, so we already have fairly recent case law on point.

A final observation I want to make is that the government of Saudi Arabia ultimately makes the call to who will be invoking sovereign immunity, and we are in discussions with Michael Kellogg, the attorney for the kingdom, and we hope to have a proposal ready to share with plaintiffs and Judge Daniels at the July 16 conference as to exactly who will be going forward with the renewed Rule 12(b)(1) motion.

MR. CARTER: Your Honor, I guess a couple of problems. We're not conceding that these defendants have preserved common law immunity defenses at this time. They raised FSIA defenses.

They didn't have any right to remedies available under that statute. The Supreme Court made that clear. Some courts have since questioned whether a defendant who fails to raise a common law claim maybe has in fact waived it.

But putting that aside for a moment, I think the issue here is sort of twofold, what the track should be for any potential common law immunity and the process should be, and then second, whether or not the jurisdictional discovery that was clearly directed to go forward by the Second Circuit should happen along a parallel track. With regard to that latter issue, it seems to us quite clear the Second Circuit issued a directive that the discovery proceed. It was aware from the briefing that these defendants had an intention of raising common law immunity defenses. The Second Circuit didn't pause as a result of that indication in directing that discovery go forward. Were we to go down a path of litigating common law immunity while discovery was stayed, we risk having ourselves up on appeal, two, three times, potentially, and that doesn't make sense.

In addition, it's quite likely that certain of the discovery for personal jurisdiction would inform the common law immunity issues. I don't want to sort of litigate the substance of those at this point, but it may very well save us quite a bit of time to do that.

With regard to the process, it's quite clear that the

State Department should be afforded an opportunity to weigh in with regard to these common law immunity doctrines. We're returning essentially to the regime that was in place under the pre-FSIA era. The normal course would be either for the defendants themselves to seek a statement of interest from the State Department, if they were so inclined, or for the Court -- either to ask for it from the Court or to direct the defendants to ask for it.

And so before we talk about a briefing schedule, we should really be talking about going to the State Department. I have been involved in one case already where the State Department's response to a request for a statement of interest was to say that we think there are areas of discovery that need to be conducted before we can weigh in and give you the view. So it seems that that should happen first so we make sure that we do everything efficiently and whatever record may later go up is complete.

MR. KABAT: Your Honor, I note that Rule 12(b)(1) motions cannot be waived, and we have the absolute right to bring them. And whole purpose of immunity is not to give immunity from lawsuits but also immunity from discovery.

THE COURT: Well, I understand the theory, but even though the defendants were relying on the FSIA and now has to resort to common law immunity, there is the argument that that defense has been waived.

Without judging the merits of that, it seems to me we can't have this go on forever. So my ruling with respect to what Mr. Carter raises is going to be that discovery in those narrow areas can go forward pending the motion practice. If you want to take that up with Judge Daniels by way of objection, you certainly can. I understand why you might, but that's going to be my ruling.

In terms of the schedule for the motions, what are you proposing?

MR. KABAT: We haven't actually discussed it. Maybe one month for the motion and one month for the opposition and two or three weeks for the reply.

THE COURT: Well, maybe what I simply ought to do -- I understand plaintiffs take the view that this is something that Judge Daniels should deal with, and I think it's safe to say that he has a different view. But why don't I simply say that the two sides should confer because there are a number of issues, as you understand, Mr. Carter, and submit a proposal to me, either a single proposal, or like the letter that I received before this conference, something that sets out each side's position. And while we're coming up on the holidays, say within two weeks. OK?

MR. CARTER: That's fine, your Honor.

THE COURT: As to the FOIA documents that initially were listed on the privilege log and now have been withdrawn

because the plaintiffs conclude that they are not relevant, I'm not sure why the mere fact that they were listed on the privilege log suggests somehow that they're fair game if after listing them the plaintiffs conclude otherwise. Which is not to say that at a deposition there couldn't be inquiry into the reasoning behind that, and if need be, an application to the Court. But if somebody mistakenly lists something on a privilege log, and it's not -- I will use the word "relevant," but it's not responsive to a request, then it seems to me there's no particular reason why it should be produced.

Does anybody have anything they want to say in that regard?

MS. BERGOFFEN: The Dubai Islamic Bank doesn't have any position.

MR. MOHAMMEDI: As long as it's there by mistake it's fine. If they just decide they're not relevant, then that's an issue.

MR. HAEFELE: Your Honor, they shouldn't have been put on the privilege log in the first place. That's why we withdrew them from on the privilege log. And them not being on the privilege log now, it seems to me that they don't need to be produced. The same way as the bank documents, they have been withdrawn from the privilege log and they're not being produced. Honestly, I think if we produced them they would be like: Why are you flooding us with this stuff? It means

nothing.

THE COURT: There's the Hoglan and maybe the Havlish plaintiffs' request to amend the complaint.

MR. FLEMING: Yes, your Honor.

THE COURT: You're Mr. Fleming?

MR. FLEMING: Yes, your Honor. We're here today with respect to the Harlan case simply to -- we filed two motions that are pending. The first is a motion for leave to amend, which added a number of plaintiffs, and then we filed a second motion simply to supplement that because there was a slight error in how one of the plaintiffs was described in terms of both the claims themselves and -- her claim herself as well as the estate that she was representing. And so we filed those and just seeking to -- hoping for an order to be able to amend it. And we also --

THE COURT: Your letter describes this as a technicality failing which you would simply institute a new action. But would we have statute of limitations problems?

MR. FLEMING: We would, and because of that we did file -- actually on the 60th day after the Havlish judgment was entered we did go ahead and file the complaint in sort of an abundance of caution trying to cover all our bases. So there is that concern, yes. Because the National Defense Authorization Act explicitly authorized filing cases that are related to a timely case, which Havlish was, we think there is

no statute of limitations issue on that basis. Of course, if the defendants were to raise that as a statutory -- as an affirmative defense, they might make an argument, but we think it's pretty clear that the National Defense Authorization Act authorizes filing of the case within 60 days after the final judgment in Havlish.

THE COURT: And I take it by virtue of who it is that you're seeking to sue, I think there's no opposition to the motion, is that correct?

MR. FLEMING: There is no opposition to the motion, to either motion, I should say. As I say, the second motion is only a technicality, really just a very --

THE COURT: So both relate to Hoglan, the second motion corrects an error in the first motion.

MR. FLEMING: Yes, your Honor.

THE COURT: And since there's no opposition, I see no reason not to grant those, both of those motions.

MR. FLEMING: When the Court does enter those, we will be moving directly to the service phase. We've got that ready to go, the translations are done, and we will then be filing also a lis pendens motion to follow that.

THE COURT: You've got two separate orders. Does it make sense for this to be combined into one order?

MR. FLEMING: We certainly could do that and deliver it to your chambers.

THE COURT: Why don't do you that. And as soon as I receive it, I will sign it.

MR. FLEMING: Thank you. Your Honor, just want to point out with respect to Havlish, a couple of small matters, one is that we just wanted -- we have a lis pendens motion pending there since March 30, 2012. We supplemented that in November of 2012.

THE COURT: That's pending before Judge Daniels?

MR. FLEMING: That's correct. We are anticipating a notification from the State Department of the final service, completion of service through the diplomatic process. When that happens, which we are really hoping that will happen within 10 to 20 days from now, based on what we understand has already occurred, we will immediately be filing our motion for a 1610(c) order. And we are respectfully requesting as expeditious consideration of that as possible because enforcement proceedings are also commenced and are well advanced. So it would be very helpful for us to get the 1610(c) order rapidly and appreciate that.

THE COURT: I will let Judge Daniels know that that's an issue.

MR. FLEMING: One last thing, very minor, I didn't think I would bring it up, but I realized Mr. McCoy here who is admitted in the Hoglan case pro hac vice and receiving everything in Havlish as well. Apparently you have not

received the pro hac vice order in Havlish, and since he had his shoulder to the wheel on the 1610(c) matter, I was hoping we could get that signed so he could put his name on it.

THE COURT: Every time I try to open the docket sheet in this case my computer overheats, so if you let my chambers know the ECF number we'll deal with that.

MR. FLEMING: Thank you, your Honor.

MR. McCOY: Thank you, your Honor.

MR. FLEMING: That's all we had.

THE COURT: OK. There was also the plaintiffs' request that defendants should be required to certify the completeness of their productions and that they have undertaken comprehensive searches, and the defendants' opposition to that, but request that if I do order it, it run both ways. Obviously if I were to order it I would require that it run both ways, but since the federal rules require that there be reasonable searches undertaken, I'm not sure why I'm ordering something that is an obligation to begin with.

MR. CARTER: Your Honor, I think given the history, and there have been a number of occasions in which a defendant came to the Court and affirmatively stated all the responsive documents had been produced and that it was done, and it subsequently turned out that was retracted as a statement. So we're looking for some bench mark when some defendant would say we're done, we produced everything and that's the end of it and

we completed our search.

MR. KABAT: Your Honor, under Rule 26, any party, plaintiff or defendant, always has the right to supplement the production with discovery of evidence or evidence relating to expert witness issues.

THE COURT: Well, Rule 26(g)(1) says every discovery request, response, et cetera, must be signed by one attorney of record who then is certifying that to the best of that person's knowledge, information and belief, after a reasonable inquiry, disclosure that issue is complete as of the time made, with respect to a discovery request, response, objection consistent with the rules or non-frivolous argument to extend them. I'm paraphrasing, obviously. It really doesn't speak directly to the issue that Mr. Carter was raising.

There's another section.

MS. BERGOFFEN: Rule 26(e).

THE COURT: I knew there were two. That deals with supplementation.

MS. BERGOFFEN: That's what we're trying to avoid, your Honor, is some certification that plaintiffs want to us sign that defendants have searched and we don't have any more documents that we could ever produce, and it's simply at odds for the rule that allows for supplementation.

THE COURT: I think I'm not going to require that at the present time. As we get closer to the end of the six-month

period I'm willing to reconsider that, but for the moment I'm not going to require that.

Any other issues that we ought to be taking up today?

MR. KABAT: We have a status conference with Judge Daniels on July 16, and I wonder whether it makes sense to set a discovery conference, just a place holder, maybe in early August. Maybe we can do that as part of our two-week report that Mr. Carter and I will be making, maybe we could include our available proposed dates.

MR. CARTER: I think that makes sense, your Honor.

THE COURT: Yeah, I agree.

Anything further?

I do note that Judge Daniels' chambers I think will, as he has in the past, be reaching out to both sides shortly to get some sort of heads up as to what issues might be raised with him on July 16 conference, if it's held.

MR. CARTER: Correct, your Honor. There was one other issue that we had intended to raise. It related to some concerns we had about the supplemental information that defendant Jelaidan submitted related to the Bank of Austria, but given that Mr. McMahon is not on the line, I will send your Honor a letter.

THE COURT: Fair enough.

Thank you all. Have a good holiday.

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